No. 12417

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE HALL REED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

ERNEST A. TOLIN,
United States Attorney,
NORMAN W. NEUKOM,
Assistant U. S. Attorney, Chief of Criminal Division,
PAUL MAGASIN,
Assistant U. S. Attorney,
600 United States Postoffice and Courthouse Building, Los Angeles 12,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLEE.

I.

Jurisdictional Statement.

A. The United States District Court for the Southern District of California had jurisdiction by virtue of 18 U. S. C. 724—(*Suspension of imposition or execution of sentences and placing of defendant upon probation; power of courts; revocation . . .*), now 18 U. S. C. 3651—(*Suspension of Sentence and Probation*) and 18 U. S. C. 725—(*Same; powers of probation officers, arrest of probationer*), now 18 U. S. C. 3653—(*Report of Probation Officer and Arrest of Probationer*), based upon a conviction under 18 U. S. C. 76—(*Falsely pretending to be a United States Officer*), now 18 U. S. C. 912—(*False Personation—Officer or Employee of the United States*).

B. The Chief Probation Officer, Probation System, United States Courts, District Court of the United States, Southern District of California, presented an official report on the conduct and attitude of the probationer, specifically referring to the passing of checks, and thereafter an Order was entered for the issuance of a bench warrant for the arrest of said probationer and for his appearance before the Court to show cause why his probation should not be revoked. [Clk. Tr. pp. 16, 17.] The defendant probationer was originally convicted on his pleas of *nolo contendere* to an Indictment charging him with falsely pretending to be a United States officer and employee, thereby obtaining funds. [Clk. Tr. pp. 11, 12.]

C. This Court has jurisdiction by virtue of 28 U. S. C. 1291—(*Final decisions of district courts*).

II.

Statement of Facts.

The pertinent facts relating to this appeal, as reflected by the record, indicate that the defendant probationer was originally convicted on Counts I and II of a five Count Indictment charging him with falsely pretending to be a United States officer and employee, thereby obtaining funds; his conviction was predicated on his pleas of *nolo contendere,* the remaining Counts of the Indictment having been dismissed on motion of the United States Attorney. Thereafter, defendant was sentenced to imprisonment for nine months on Count I, and to imprisonment for eighteen months on Count II, sentence on Count II to begin and run consecutively to the sentence imposed on Count I; but the execution of the sentence imposed on Count II was suspended, and defendant was placed on pro-

bation for a period of five years, conditioned that he would not violate the law, and further that he would report to the Probation Officer every sixty days. [Clk. Tr. pp. 11 ,12.]

At probationer's request, the Probation Officer obtained an Order from the Court allowing the suspension of supervision of the defendant probationer so that probationer could reside in Mexico, supervision to be reinstated upon his return to the United States. [Clk. Tr. pp. 13, 14.] While out of the country, probationer issued checks payable at the Wells Fargo Bank and Union Trust Company in San Francisco, California. [Clk. Tr. p. 17, lines 8-17.] Evidence of the passing of these checks which were drawn on a non-existent bank account was introduced at the hearing for revocation of probation. [Clk. Tr. p. 24, lines 17 and 18.] The probationer was arrested in New York and returned to Los Angeles. [Clk. Tr. p. 21.] The Court thereupon found that the defendant had violated the conditions of his probation, and ordered revocation thereof. [Clk. Tr. p. 24.] Thereafter, the Court entered its judgment imposing the original suspended sentence on Count II. [Clk. Tr. p. 27, line 25, to p. 28, line 2.]

III.

Questions Presented by Appeal.

A. Whether or not the United States District Court for the Southern District of California had jurisdiction over the person or acts of probationer, the appellant herein.

B. Whether or not the Court had sufficient grounds for revocation of probation.

IV.
ARGUMENT.

A. The Court Did Not Err in Assuming Jurisdiction of the Probationer and Issuing Its Bench Warrant for His Arrest.

The Federal Probation Act, 18 U. S. C. 724, 725, (now 18 U. S. C. 3651, 3653, effective September 1, 1948), confers an authority commensurate with its object. It was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.

Burns v. United States, 287 U. S. 216 at p. 220.

Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor and not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved," to suspend the imposition or execution of sentence and "to

place the defendant upon probation for such period and upon such terms and conditions as they may deem best."

Burns v. United States, 287 U. S. 216, at pp. 220-221.

The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not exceed five years.

The Probation Officer when directed by the Court must report to the Court with a statement of the conduct of the probationer. The Court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period, the probationer may be arrested, either with or without warrant, and thereupon he "shall forthwith be taken before the Court."

Burns v. United States, 287 U. S. 216, at p. 221.

Appellant argues that he was illegally removed from New York City where proceedings were allegedly pending for his release. (App. Br. p. 4, lines 11-18.)

Probation is a system of tutelage under supervision and control of the Court having jurisdiction over the convicted person, having the record of conviction and sentence, records and reports of compliance with probation, and having aid of local probation officer under whose supervision defendant is placed. Thus, under this Section, such jurisdiction is not divided between the controlling Court and a Court of another district.

See:

Frad v. Kelly (C. C. A. 2, 1937), 89 F. 2d 866, 301 U. S. 681, 58 S. Ct. 188, 82 L. Ed. 282.

One who is on probation is not at liberty, but he is in custody and under the control of the Court having jurisdiction.

United States v. Koppelman (D. C. Pa. 1943), 53 F. Supp. 499.

The District Court had jurisdiction of the hearing for revocation of probation in this case, it not being disputed that this was the Court which originally sentenced the defendant and placed him on probation. [Clk. Tr. pp. 9-10.]

Defendant urges, in support of his appeal, that his acts were not under the jurisdiction of the Court, indicating in substance that the release from supervision meant a license to do as he pleased. This proposition is incorrect. The plain meaning of plain words, together with common sense, indicated that the Court's Order simply abated the supervision of the Probation Officer over the probationer, thus eliminating the necessity of making reports.

The Court, under the Statute, still had supervisory control of the probationer.

United States v. Moore (C. C. A. 2, 1939), 101 F. 2d 56, 57—Cert. den. 306 U. S. 664, 83 L. Ed. 1060, 59 S. Ct. 788;

Frad v. Kelly (N. Y. 1937), 89 F. 2d 867, 869, 302 U. S. 312, 82 L. Ed. 282, 58 S. Ct. 188;

Crowder v. Aderhold (C. C. A. 8, 1931), 46 F. 2d 357;

18 U. S. C. 3653.

B. The Court Had Sufficient Grounds for Revocation of Appellant's Probation, Such Action Being Solely Within Its Sound Discretion.

The only point of complaint that possibly could be urged on an appeal from an Order revoking probation is an alleged abuse of discretion on the part of the lower Court. Whether or not there has been an abuse is to be determined in accordance with familiar principles governing the exercise of judicial discretion. This implies conscientious judgment—not arbitrary action. It takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge to a just result.

Burns v. United States, 287 U. S. 216, at pp. 222, 223;

Pritchett v. United States (C. C. A. 4, 1933), 67 F. 2d 244, 245.

Evidence of bad conduct may be sufficient for revoking probation although such conduct does not prove commission of a new crime.

Furrow v. United States (C. C. A. 4, 1931), 46 F. 2d 647, citing

Campbell v. Aderhold (D. C. Ga. 1929), 36 F. 2d 366.

The hearing in the present case involved an inquiry as to the passing of bad checks. Members of the Bar Association Committee for Indigent Defendants were available at the hearings which were called before the United States District Judge. [Clk. Tr. p. 18.]

At the final hearing, witnesses were sworn and evidence was presented. The Court, after receiving the

evidence and hearing arguments of counsel, found that defendant had violated the conditions of his probation. He ordered the probation revoked. [Clk. Tr. pp. 24-27.]

The Court did not abuse its discretion in the present case.

Appellant urges insufficiency of the warrant. (App. Br. p. 7, lines 29-30.) The law allows the arrest of the probationer, with or without a warrant, for a hearing in connection with his conduct on probation.

United States v. Moore, supra;
Burns v. United States, supra.

V.

Conclusion.

It is respectfully urged that the Judgment of the United States District Court for the Southern District of California revoking the probation of Appellant and imposing the serving of the original suspended sentence is valid and proper, and should, therefore, be affirmed.

Dated this 25th day of January, 1950.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

NORMAN W. NEUKOM,
Assistant U. S. Attorney, Chief of Criminal Division,

PAUL MAGASIN,
Assistant U. S. Attorney,

Attorneys for Appellee.